IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 151

UNITED STATES, et al.,

Appellants,

v.

GREAT NORTHERN RAILWAY COMPANY,

Appellee.

PETITION FOR REHEARING

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The above-named appellee, Great Northern Railway Company, presents this, its petition for a rehearing of the above-entitled cause, disposed of by an opinion delivered June 2, 1952, and in support of this petition respectfully shows:

I

Appellee does not seek a rehearing of the single question the Court decided. It seeks a rehearing of two independent questions raised and argued in this Court but not decided in the opinion delivered June 2, 1952. The District Court has already resolved these two questions in favor of appellee.

Since, as we presently show, the District Court's determination thereof required entry of the judgment below, notwithstanding the issue considered by this Court in its opinion of June 2, 1952, then unless the District Court is now found to be wrong, the judgment below must be affirmed. A decision by this Court on these two questions will not require this Court "to review an administrative record in the first instance" and so will not be contrary to this Court's stated practice.

II.

First Question

The District Court set aside an order of the Interstate Commerce Commission prescribing (1) joint rates between points on the Montana Western Railway and points on the Great Northern Railway, and (2) divisions of such rates. This Court held in its decision of June 2, 1952, that establishment of joint rates was not prohibited by Section 15 (4) of the Interstate Commerce Act.[1] That is all. The opinion does not touch the question whether or not the Commission's prescription of divisions was invalid for want of essential findings under Section 15 (6).[2] This question was argued on pages 57-60 of appellee's brief in this Court.

The Commission's power to fix divisions is not affected by Section 15 (4). It is circumscribed by Section 15 (6). Section 15 (6) provides in part:

> "Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable

[1] 49 U. S. C. Section 15 (4).
[2] 49 U. S. C. Section 15 (6).

to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or undûly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers * * *."

The District Court expressly found:

"The order fixing divisions [under Section 15 (6)] was entered without any finding in the report that any existing divisions have been, are, or will be unlawful or that the existing apportionment of through charges has been, is, or will be unlawful in any respect." (R. 602)

The existing apportionment of through charges is now made under separately established proportional rates. In its opinion the District Court said:

"The Commission makes no particular point with reference to the reasonableness of the existing rates, and it makes no finding that such rates were unreasonable." (R. 593)

And in a footnote reference to this statement the District Court further said:

"In *Beaumont, S. L. & W. Ry. v. United States*, 282 U. S. 74, at page 82, the Court, citing cases, says:

"'The Commission may not change an existing division unless it finds that division unjust or unreasonable.'" (R. 593)

The quoted finding and these excerpts from the District Court's opinion show that it has already been determined below that the Commission's order fixing a new apportion-

ment of through revenues is invalid for want of the findings made prerequisite to the establishment of divisions under Section 15 (6); that is, for want of findings that the existing proportions of the through revenue "are or will be unjust, unreasonable" or otherwise violative of the standards therein set forth.

This Court's decision of June 2, 1952, on the separate and independent issue of whether the establishment of joint rates was violative of Section 15 (4) has no bearing on the question of whether the Commission's establishment of divisions was void because of the absence of basic findings upon which exercise of its power under Section 15 (6) is expressly conditioned. The Commission's order was properly enjoined on this ground alone if the District Court's finding was correct. Determination on this appeal of the question whether the District Court's finding was right will not require this Court "to review an administrative record in the first instance". This Court may not now reverse unless it finds that the District Court was wrong. It is idle to remand the proceeding for redetermination of an issue not found to be incorrectly decided, the original determination of which was in no way governed by the principle announced in this Court's opinion.

III.

Second Question

The District Court also found:

> "The Commission's * * * order requiring a cessation of the present basis of apportioning through revenues under said proportional rates and its report and order prescribing joint through rates and divisions for the

future, are based upon an insufficiency of competent evidence of record to support such a result and are in fact arbitrary, directly contrary to the evidence, and result in an apportionment of revenues unduly favorable to the Montana Western and clearly unfair to the Great Northern." (R. 602)

The opinion below contains language to the same effect (R. 594).

The Commission measured the reasonableness of the divisions it determined by a standard borrowed from another case heard some years ago, involving other rates in another territory on a different kind of traffic and upon the assumption, entirely *de hors* the record, that transportation conditions involved in the present case were comparable to those in the case from which the standard was borrowed. This matter is argued at pages 61-62 and 68-70 of appellee's brief and in footnote 37, page 42, of appellants' brief.[3] A mere reading of the Commission's report, as distinguished from a review of the entire record, clearly indicates that the Commission's determination of the question of divisions rested in substantial part on this borrowed standard. It does not require a review of the entire administrative record for this Court now to reach the conclusion that this action of the Commission in giving weight in its report "to matters * * * treated as evidence when not introduced as such" requires that its order be set aside. In considering a Commission report in an earlier divisions case where weight was attached to matters taken from the Commission's files but not intro-

[3] References herein to appellants' brief are to the brief of the appellants United States and Interstate Commerce Commission.

duced in evidence, this Court in *United States v. Abilene & So. Ry. Co.*, 265 U. S. 274, said at page 289:

> "* * * the carriers were left without notice of the evidence with which they were, in fact, confronted * * *. The requirement that in an adversary proceeding specific reference be made, is essential to the preservation of the substantial rights of the parties."

To the same effect are *Erie R. Co. v. U. S.* (S. D. Ohio, E. D.), 59 Fed. Supp. 748, and *Texas and Pacific Ry. Co. v. Atchison, T. & S. F. Ry. Co.*, 176 I. C. C. 388.

Section 15 (6) requires that in

> "* * * prescribing and determining the divisions of joint rates * * *, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation. * * *"

and various other matters. Appellants do not and cannot contend that there was any evidence before the Commission concerning the revenues, operating expenses and taxes of the Great Northern, or any evidence of what was or may be required to produce a fair return on its railway property, for there was no such evidence. Since this lack of evidence made it impossible for the Commission to consider, in respect to one of the parties to the prescribed divisions, factors which the statute specifically requires to be considered, the Commission was not competent to make a finding either that the existing proportions of through revenues were "unjust, unreasonable, inequitable" or otherwise unlawful or that

the prescribed divisions for the future would be "just, reasonable and," as Section 15 (6) directs, "equitable" as between the parties. In *Brimstone R. R. v. U. S.* 276 U. S. 104, where this Court considered a Commission order based on evidence of the revenue requirements of one of the participating carriers only, it was said (p. 117):

> "The record discloses that before making the challenged order the Commission failed to consider the items definitely specified by Section 15 (6). And it must be annulled."

To the same effect is *United States v. Abilene & So. Ry. Co.*, 265 U. S. 274. See *Nevada-California-Oregon Divisions*, 73 I. C. C. 330, 336; *Divisions of Joint Rates and Fares of M. & N. A. R. R. Co.*, 68 I. C. C. 47, 58. This point was argued at pp. 63-66 of appellee's brief.

The Commission's gratuitous assumption that a standard used in another unrelated proceeding involving different traffic in a different territory would do as a measure for determining divisions in this case and its utter failure to consider factors which Section 15 (6) directs that it consider in determining divisions demonstrate that the District Court was correct in finding that the Commission's order was "based on an insufficiency of competent evidence". (R. 602) Even if, as this Court has now held, the District Court was wrong in its determination of the single issue decided in this Court—as to the extent of the Commission's power to prescribe joint rates in view of the terms of Section 15 (4)—nevertheless, if the District Court's judgment was right on any ground it must be affirmed. See *Helvering v. Gowran*, 302 U. S. 238, 245, and cases there cited.

WHEREFORE, it is respectfully submitted that this petition for a rehearing be granted, that the judgment of the District Court be, upon further consideration affirmed, and that in the meantime no mandate be issued by this Court.

Dated at St. Paul, Minnesota, this 13th day of June, 1952.

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CERTIFICATE OF COUNSEL

I, Louis E. Torinus, Jr., of counsel for the above-named appellee, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

Dated June 13, 1952

LOUIS E. TORINUS, JR.
Of Counsel